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No. 80-704

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, TRUSTEE, ETC., ET AL.,
PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. Petitioners seek a writ of certiorari before judgment to review an injunction (Pet. App. b-1 to b-4) entered by the United States District Court for the Northern District of Illinois on October 15, 1980, which prohibits the Interstate Commerce Commission, the Secretary of Transportation and the Trustee of the Rock Island Railroad from fulfilling their obligations under Sections 106 and 110 of the Rock Island Railroad Transition and Employee Assistance Act ("Rock Island Act"), Pub. L. No. 96-254, 94 Stat. 401 and 403, as amended by the Staggers Rail Act of 1980, Pub. L.

No. 96-448 (Oct. 14, 1980).[1] Oral argument was held on November 13, 1980, before the Seventh Circuit, sitting en banc, on an appeal of this injunction taken under Section 124(a) of the Rock Island Act, as amended by the Staggers Rail Act (see Pet. App. j-l). A decision on that appeal is due by December 28, 1980 (Section 124(b), Pet. App. j-l).

The October 15 injunction (Pet. App. b-1 to b-4) was entered after a motion had been filed to vacate, in light of the passage of the Staggers Rail Act, an injunction entered by the district court on June 9, 1980 (Pet. App. d-1 to d-2), against the enforcement of Sections 106 and 110 of the Rock Island Act as originally enacted. The background of these proceedings is set forth in detail in the government's response to the jurisdictional statement in *Railway Labor Executives' Association* v. *William M. Gibbons, Trustee, et al.*, No. 80-415, at 1-9, which involves a direct appeal of the June 9 injunction.

2. Petitioners contend (Pet. 8-12) that the court of appeals lacks jurisdiction over an appeal of the October 15 injunction because of the principles of pendent jurisdiction. Since a direct appeal of the June 9 injunction has been taken to this Court, petitioners argue, the October 15 injunction is reviewable only in this Court under 28 U.S.C. 1252 because it is related to the first injunction. This contention is insubstantial.

First, the October 15 injunction does not present issues subsidiary to those presented in the appeal pending in this Court, No. 80-415, so as to make pendent jurisdiction appropriate. The second injunction presents a completely different question concerning the constitutionality of a new

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[1]Sections 106 and 110 of the Rock Island Act, as originally enacted, are set forth in Appendix I of the petition, i-1 to i-4. Section 701 of the Staggers Rail Act, which amends the Rock Island Act, is set forth in Appendix J to the petition, j-1 to j-4.

statute that was enacted specifically to eliminate the constitutional questions that had been raised concerning the original Rock Island Act and that formed the basis for the June 9 injunction. Indeed, as explained in the government's brief in No. 80-415 (at pages 9-13), we believe that the appeal pending in this Court presents only the academic question of the constitutionality of a statute that no longer exists and thus that the June 9 injunction should be vacated as moot in light of the passage of the Staggers Rail Act. Therefore, the pending appeal in No. 80-415 provides no basis for pendent jurisdiction over an appeal from the October 15 injunction.[2]

Moreover, petitioners' pendent jurisdiction theory rests on the congressional intent embodied in 28 U.S.C. 1252 that, once a direct appeal to the Supreme Court has been taken under that Section, all subsequent appeals in the same case should be taken to this Court. However, Section 1252 has been superseded in this case by Section 124(a) of the Staggers Rail Act, which provides that "[n]otwithstanding any other provision of law," an appeal of a decision declaring any provision of the Rock Island Act unconstitutional shall be taken to the Seventh Circuit. Because the October 15 injunction is a decision that falls within the ambit of Section 124(a), it is clear that Congress intended that it be reviewed in the Seventh Circuit, irrespective of the general rule of Section 1252.

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[2]Even if the October 15, 1980, decision is viewed as simply continuing the earlier injunction in force—a view we consider to be untenable—petitioners err in suggesting (Pet. 11) that the Staggers Rail Act cannot be read as divesting this Court of jurisdiction over a pending case. In fact, the general rule is that when Congress divests a court of jurisdiction over a particular class of cases, pending cases are also included unless the statute expressly preserves jurisdiction over them. See *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386, 390 (1953); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952). None of the cases cited by petitioner stands for a contrary proposition where, as here, ultimate recourse may be had to this Court.

In any event, even if petitioners were correct in asserting that an appeal of the October 15 injunction may only be taken to this Court, it would not justify the relief requested. If the court of appeals is without jurisdiction to decide the appeal, this Court would likewise lack jurisdiction to decide the appeal following the grant of a writ of certiorari. See, *e.g.*, *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976). Only cases properly "in" the court of appeals may be brought to this Court by writ of certiorari before judgment.[3] See R. Stern & E. Gressman, *Supreme Court Practice* 54-55 (5th ed. 1978):

> But it is also necessary that the appeal, even though docketed in the court of appeals, be properly "in" that court at the time when the petition for certiorari before judgment is filed. A case is properly "in" the court of appeals if the judgment of the district court is an appealable order or otherwise falls within the jurisdiction of the courts of appeals. *United States* v. *Nixon*, 418 U.S. 683, 690-692. Put differently, what the Supreme Court is asked to do by way of granting certiorari before judgment is to render the kind of judgment on the merits of the appeal that the court of appeals could have rendered. If there be a jurisdictional defect that would preclude the court of appeals from reaching the merits of the appeal, that defect likewise prevents the Supreme Court from resolving the merits upon the grant of certiorari before judgment.

3. Assuming that the Seventh Circuit does have jurisdiction, petitioners seek (Pet. 12-16) a writ of certiorari

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[3]Petitioners' appropriate course, if their jurisdictional argument had merit, would be to move to dismiss the appeal to the Seventh Circuit for lack of jurisdiction. Petitioners in fact made such a motion on October 25, 1980. That motion is now pending before the court of appeals.

before judgment in the interest of "efficient allocation of judicial resources" (*id.* at 16). This request is without merit.

Congress specifically established a procedure for expedited review of constitutional questions under the Rock Island Act (see Sections 106(d) and 124, Pet. App. j-1, j-3), and there is no reason to interfere with that procedure. The Seventh Circuit's decision is reviewable in this Court; thus, no possible danger of inconsistent adjudications is presented. Moreover, the court of appeals has already heard argument on the merits of the appeal, and it must render its decision by December 28, 1980. Allowing the court of appeals to complete its consideration not only gives effect to the manifest intent of Congress, but also is consistent with principles of judicial economy and the sound administration of justice.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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